Supreme Court, U.S.
FILED
JUN 11 1998
OFFICE OF THE CLERK

No. 97-1820

In The

Supreme Court of the United States

October Term, 1997

ALTIPENTA, INC.,

Petitioner,

vs.

SECURITY INSURANCE COMPANY OF HARTFORD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN F. BALL
Counsel of Record
MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
Attorneys for Respondent
1845 Walnut Street, 19th Floor
Philadelphia, Pennsylvania 19103
(215) 575-2784

QUESTION FOR REVIEW

Whether it is inappropriate for this Honorable Court to grant the instant petition for a writ of certiorari, vacate the court of appeals' judgment order, and remand the matter to the court of appeals for consideration of a subsequent decision by another panel of the court of appeals on a point of state law, issued after the court of appeals no longer had jurisdiction over the instant matter, when the subsequent decision disregarded an intermediate state appellate court case on point and instead made a contrary prediction as to how the highest state court would decide the issue?

STATEMENT OF INTERESTED PARTIES

Petitioner is Altipenta, Inc., one of the defendants before the district court and the appellant before the United States Court of Appeals for the Third Circuit[1]. Upon information and belief, Altipenta, Inc. does not have any parent companies or any nonwholly owned subsidiaries.

Respondent is Security Insurance Company of Hartford, the plaintiff before the district court and the appellee before the court of appeals. Security Insurance Company of Hartford is a wholly owned subsidiary of the publicly owned Orion Corporation. Security Insurance Company of Hartford has no nonwholly owned subsidiaries.

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[1] Mary A. Pepe, Administratrix of the Estate of Richard Pepe, Barbara DiMario, Administratrix of the Estate of Hope Ann Popoleo, and Anthony Casterioto, three of the other defendants in the proceedings before the district court, each initiated their own appeals to the court of appeals. However, the court of appeals dismissed their appeals for failure to prosecute. Thus, Petitioner Altipenta, Inc. remains the sole interested party among the defendants in the proceedings before the district court.

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I

COUNTERSTATEMENT OF THE CASE

Procedural History

On October 30, 1995, Respondent Security Insurance Company of Hartford (hereinafter "Security"), commenced a declaratory judgment action pursuant to 28 U.S.C. §2201, in the United States District Court for the Eastern District of Pennsylvania, which had jurisdiction pursuant to 28 U.S.C. §1331. In pertinent part, Security's complaint sought a declaration that it did not owe a duty to defend or indemnify its insured Petitioner Altipenta, Inc. (Altipenta), in three state court actions brought against Altipenta relative to shootings which occurred on April 21, 1993 inside a bar owned and operated by Altipenta[2]. Because the case presented an issue of law -- interpretation of the insurance policy issued by Security to Altipenta --

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[2] Security also named as defendants in the declaratory judgment action the plaintiffs in the underlying state court actions (see footnote 1, supra), and Teryl Wyrick, the perpetrator convicted of two counts of first degree murder in connection with the shootings inside Altipenta's bar.

rather that a genuine dispute as to any material fact, Security filed a motion for summary judgment. Security's motion and the responses thereto were referred to Magistrate Judge Carol Sandra Moore Wells.

The Magistrate Judge issued a Report and Recommendation wherein she recommended that District Judge Thomas N. O'Neill, Jr. grant Security's motion for summary judgment, enter declaratory judgment in favor of Security, and issue an order declaring that Security has no duty to defend or indemnify Altipenta in the state court actions brought by or on behalf of the victims of the April 21, 1993 shootings inside Altipenta's bar. (App. to Pet. for Cert. at 6a-25a). There were no objections to the Report and Recommendation of the Magistrate Judge. Consistent with the Magistrate Judge's Report and Recommendation, the District Judge entered an order on December 17, 1996, granting the Security's motion for summary judgment, entering declaratory judgment in favor

of Security and against Altipenta and the shooting victims, and declaring that the Security owed no duty to indemnify or defend Altipenta in the state court actions. (App. to Pet. for Cert. at 4a-5a).

Altipenta appealed the district court's order to the United States Court of Appeals for the Third Circuit[3]. By judgment order dated February 9, 1998, the court of appeals affirmed the grant of summary judgment in favor of Security. (App. to Pet. for Cert. at 2a-3a). Altipenta did not timely file a petition for rehearing. Thereafter, on March 3, 1998, the court of appeals issued a certified copy of the judgment order in lieu of a formal mandate.

On March 27, 1998, more than one month after the time for filing a petition for rehearing had passed and more than three weeks after the issuance of the certified copy of the judgment order in lieu of a formal mandate,

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[3] The shooting victims each filed their own appeals which were later dismissed for failure to prosecute. See footnote 1, supra.

Altipenta filed a motion requesting the court of appeals to recall the mandate and a petition for rehearing in banc nunc pro tunc. Altipenta based its motion and petition on the opinion issued by another panel of judges of the court of appeals in Nationwide Mutual Fire Insurance Company v. Pipher, 140 F.3d 222 (3d Cir. March 17, 1998). Altipenta essentially requested that the court of appeals apply Nationwide retroactively to the instant matter notwithstanding that there was no appeal pending in the instant matter at the time Nationwide was decided.

The court of appeals denied the motion to recall the mandate by order dated April 14, 1998. (App. to Pet. for Cert. at 1a). The petition for rehearing was not docketed presumably because it was filed outside of the allowable time and without leave of court. Thereafter, Altipenta filed the instant petition for a writ of certiorari requesting

this Honorable Court to GVR[4].

Factual Background

The facts underlying the instant matter have never been in dispute. They may be appropriately summarized as follows:

On April 21, 1993, Teryl Wyrick shot Hope Popoleo, Richard Pepe, and Anthony Casterioto inside of the Pennant Lounge, a bar owned and operated by Altipenta. (See Report and Recommendation; App to Pet. for Cert. at 7a-8a). Apparently, Wyrick had been following Popoleo and Pepe from bar to bar before they arrived at the Pennant Lounge. (Id.).

Popoleo expressed her concern regarding Wyrick's conduct, which she perceived as threatening, to a bouncer

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[4] GVR is the acronym ascribed to the procedure whereby this Honorable Court grants certiorari, vacates the judgment below, and remands the matter for further proceedings pursuant to 28 U.S.C. §2106. See, e.g., Thomas v. American Home Products, Inc., 519 U.S. ---, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996).

at the Pennant Lounge. The bouncer had Wyrick leave the premises. (Id.).

Approximately five to ten minutes later, Wyrick re-entered the Pennant Lounge. He approached Popoleo and withdrew a gun which he had concealed. As Popoleo tried to run away, Wyrick shot her three times in her back. Wyrick also chased Pepe and shot him in the neck. Popoleo and Pepe died from their gunshot wounds. Casterioto, a member of a band playing at the Pennant Lounge, was also struck in the neck and shoulder area by a bullet fired by Wyrick. Casterioto survived the incident. (Id.). Wyrick was eventually tried before a jury and was convicted of, inter alia, two counts of first degree murder for the deaths of Popoleo and Pepe. Commonwealth v. Wyrick, Court of Common Pleas for Delaware County, Pennsylvania, No. 838-93.

Civil suits were filed against Wyrick and Altipenta by Casterioto and on behalf of Popoleo and Pepe. (See

Report and Recommendation; App. to Pet. for. Cert. at 9a). In response to the three lawsuits, Security, which insured Altipenta under a commercial general liability and property policy, issued a reservation of rights letter in which it denied any duty to defend or indemnify Altipenta because the shooting incident was not an "occurrence" as that term is defined by the policy. (See Report and Recommendation; App. to Pet. for Cert. at 9a). Security nonetheless provided a defense of the underlying claims pending disposition of the declaratory judgment action by the district court. (Id.).

As noted in the procedural history of the case, supra, the district court granted summary judgment in favor of Security and the court of appeals affirmed.

REASONS FOR DENYING THE WRIT

1. It is inappropriate for this Honorable Court to GVR the instant matter because there were no intervening or subsequent decisions from any Pennsylvania appellate court which cast any doubt on the status of the Pennsylvania law applied by the district court and the court of appeals.

Implicitly acknowledging that its petition for a writ of certiorari does not satisfy any of the traditional "considerations governing review on writ of certiorari" enumerated in this Honorable Court's Rule 10, Altipenta requests that this Honorable Court should nonetheless employ the GVR mechanism. Altipenta attempts to support its request by relying upon cases wherein this Honorable Court has deemed it appropriate to GVR where the federal appellate court's ruling is based upon a construction of state law that is inconsistent with an intervening or subsequent decision of the highest court of that state. This case, however, involves a subsequent, rather than intervening, federal appellate court decision

predicting how a state supreme court would rule on an issue of state law. The subsequent decision disregards an intermediate state appellate court decision on point and renders a contrary prediction as to how the highest state appellate court may rule on an issue of state law. For the reasons which follow, Security respectfully submits that it is inappropriate to GVR this matter.

The GVR mechanism has been employed in cases where a federal appellate court's decision on an issue of state law had been called into question by an intervening state supreme court decision on point, at least since this Honorable Court's decision in Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944). On at least two occasions in recent years, this Honorable Court has examined the propriety of the use of the GVR mechanism in such circumstances. See Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company, --- U.S. ---, 117 S.Ct.

1731, 138 L.Ed.2d 91 (1997); Thomas v. American Home Products, Inc., 519 U.S. ---, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996). Although the GVR mechanism has been used for some time, these recent decisions demonstrate that the Court is certainly not unanimous as to the circumstances under which it is appropriate to GVR in light of a subsequent development of state decisional law. See Lords Landing, supra at ---, 117 S.Ct at 1733 (Rehnquist, C.J. and Breyer, J., dissenting); Thomas, supra at ---, 117 S.Ct. at 282-284 (Scalia. J., concurring), and at 519 U.S. ---, 117 S.Ct. at 284-285 (Rehnquist, C.J. and Breyer, J., dissenting).

Even if the Court had been unanimous in its decisions to GVR in Lords Landing and Thomas, neither of those decisions would compel the Court to GVR in the instant matter because the instant matter is plainly distinguishable. In both of those cases, this Court GVR'd so that the involved courts of appeals could reconsider

their decisions on issues of state law in light of intervening or subsequent decisions which the involved states' supreme courts had rendered on the same issues. In the instant matter, however, Altipenta requests the Court to GVR to allow the court of appeals to consider a subsequent decision of another panel of judges in Nationwide Mutual Fire Insurance Company v. Pipher, 140 F.3d 222 (3d Cir. March 17, 1998) which predicts how the Pennsylvania Supreme Court may decide an issue of Pennsylvania law which it has not yet directly addressed. The distinction between a subsequent decision on a point of state law by that state's supreme court and a subsequent prediction by a federal appellate court in a diversity jurisdiction case as to how a state's supreme court would decide an issue of state law is critical.

As Justice Scalia points out in his concurring opinion in Thomas, it is appropriate to vacate and remand "to allow the court of appeals to consider an intervening

decision of the court that is the final expositor of a particular body of law...." Thomas, supra at ---, 117 S.Ct. at 283 (Scalia, J., concurring). As to the issue arising under Pennsylvania law whether an intentional shooting constitutes an occurrence under an insurance policy which defines an occurrence as an accident, the Pennsylvania Supreme Court is the final expositor of the law. Because Nationwide was a diversity jurisdiction case involving that issue of Pennsylvania law, the court of appeals was merely predicting how the Pennsylvania Supreme Court, as the final expositor of Pennsylvania law, would rule on that issue, which had not yet been presented to the Pennsylvania Supreme Court. See Nationwide, 140 F.3d at ---, 1998 WL 113933 at *7 (3d Cir. 1998)(Alito, J., concurring). As the Pennsylvania Supreme Court still has not directly addressed the issue implicated in the instant matter, which issue Altipenta maintains is identical to the issue presented in Nationwide, there has not been an

intervening or subsequent decision by the final expositor of the applicable law to justify this Court to GVR in this matter. Accordingly, this case is not on point with either Lords Landing or Thomas.

Moreover, absent a controlling intervening or subsequent decision from the Pennsylvania Supreme Court, this Honorable Court should be hesitant to GVR based solely upon the court of appeals' prediction in Nationwide as to how the Pennsylvania Supreme Court would rule. While the instant petition proceedings do not request this Honorable Court to accept the Nationwide case for further review on its own merits, it is respectfully submitted that the Court should nonetheless examine Nationwide for the limited purpose of deciding whether to GVR the instant matter.

Nationwide should not serve as a basis to GVR the instant case because the court of appeals in Nationwide appears to have disregarded highly persuasive authority on

the issue there in question emanating from the Superior Court of Pennsylvania, one of Pennsylvania's intermediate appellate courts. In his concurring opinion in Nationwide, Judge Alito correctly noted that when predicting in a diversity case how a state's highest court would rule on an issue of state law, the federal court of appeals is "instructed to heed the decisions of a state's intermediate appellate court unless [the judges of the federal court of appeals] are convinced by 'other persuasive data' that the state's highest court would reach a different result. Nationwide, 140 F.3d at ---, 1998 WL 113933 at *8 (Alito, J., concurring) quoting West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 61 S.Ct. 179, 183-83, 85 L.Ed. 139 (1940). Yet the majority in Nationwide made only passing reference to the highly persuasive Superior Court of Pennsylvania opinion in Britamco Underwriters, Inc. v. Grzeskiewicz, 433 Pa.Super. 55, 639 A.2d 1208 (1994) without engaging in any analysis of that decision.

Nationwide, 140 F.3d at ---, n. 2, 1998 WL 113933 at *2, n. 2.

The lack of analysis of Grzeskiewicz should cast doubt on the Nationwide decision. In Grzeskiewicz, the Superior Court of Pennsylvania concluded that notwithstanding allegations that the insured bar was independently negligent for allowing an intentional attack to take place on its premises, the admittedly intentional attack by one patron of a bar on another patron did not constitute an occurrence under the insurance policy which defined occurrence as an accident. Compare Britamco Underwriters, Inc. v. Weiner, 431 Pa.Super. 276, 636 A.2d 649 (1994)(Where the underlying complaint alleged facts from which it could not be readily discerned whether one patron intentionally or negligently threw a bottle which struck and injured another patron, insurer had duty to defend insured bar unless and until the facts clearly demonstrated that the bottle had been thrown

intentionally). The policy under review in Grzeskiewicz was substantially similar to the policies in question in both Nationwide and the instant case relative to defining an occurrence as an accident. By relegating Grzeskiewicz to a mere passing reference in a footnote rather than analyzing that case and explaining why it found other Pennsylvania cases not directly on point and out of state cases more persuasive, the Nationwide majority arguably failed to follow the dictates of this Honorable Court in West with respect to heeding decisions of a state's intermediate appellate court as to an issue which the state's highest court has yet to address.

Altipenta does not suggest, and Security's research does not indicate that the Pennsylvania Supreme Court has given any indication that it will in fact follow the court of appeals' decision in Nationwide. Similarly, Altipenta does not suggest, and Security's research does not indicate that the Third Circuit will not faithfully adhere to its decision

in Nationwide in prospective fashion absent a contrary disposition of the involved issue of state law by the Pennsylvania Supreme Court. In tandem, these factors mitigate against the employment of the GVR mechanism in the instant case.

Throughout the time that the instant matter was sub judice before the district court and the court of appeals, those courts applied the pertinent Pennsylvania law as it was then in effect. See Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941)("... until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.")(footnote omitted). At that time, the most instructive Pennsylvania Supreme Court decision was Gene's Restaurant, Inc. v. Nationwide Insurance Company, 519 Pa. 306, 548 A.2d 246 (1988) as most

recently interpreted and applied by the Superior Court of Pennsylvania in Grzeskiewicz. The district court relied upon Gene's Restaurant and Grzeskiewicz in granting summary judgment in favor of Security. The court of appeals affirmed without opinion. There was no change in Pennsylvania law announced by any Pennsylvania appellate court at any time prior to the expiration of the time for Altipenta to have sought reargument before the court of appeals.

At the time of the filing of Altipenta's petition to this Honorable Court, as well as at the time of the filing of this brief in opposition, Gene's Restaurant and Grzeskiewicz remain good law in Pennsylvania. They have not been overruled or severely limited in their application. Nationwide is not a decision of a Pennsylvania appellate court. Thus, if this Honorable Court were to grant certiorari and review this case on its merits (which Security submits it should not), this

Honorable Court would be constrained to apply Gene's Restaurant and Grzeskiewicz. Because this matter was decided in conformity with those Pennsylvania decisions at all levels below, and because there has been no intervening or subsequent decision of a Pennsylvania appellate court which casts doubt on the continuing precedential value of those cases, there is no reason to GVR this case.

CONCLUSION

For all of the foregoing reasons, it is not appropriate for this Honorable Court to either grant a writ of certiorari or GVR the instant matter. Respondent Security Insurance Company of Hartford respectfully requests this Honorable Court to deny the instant Petition for Certiorari.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By: _____
Jonathan F. Ball, Esquire

1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
(215) 575-2784

Attorneys for Respondent Security Insurance Company of Hartford

Dated: June 11, 1998